IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

RSA No.342/1995

Decided on.26.7.2007

Dot Ram and others. **…Appellants.**

Versus

Rup Chand and others. **…Respondents**

Coram

The Hon'ble Mr. Rajiv Sharma, J.

Whether approved for reporting ?[1]*.No.*

For the appellants : Mr. C. B. Singh, Advocate.

For the respondents: Mr. K.D. Sood, Advocate.

Rajiv Sharma, J.

A challenge has been laid by way of this second appeal to the judgment and decree passed by the learned Additional District Judge, Kullu dated 15.5.1995 rendered in appeal No. 61/1993.

The brief facts necessary for the adjudication of this second appeal are that Smt. Swarnu, Tek Singh and Pune Ram had filed a civil suit in the court of Senior Sub Judge, Kullu on 30.10.1990 for declaration with consequential relief of injunction and in the alternative for possession. The trial court on the basis of the pleadings of the parties had framed the following issues:

1. **Whether the plaintiff No.1 was legally wedded wife of Shri Ram Saran? OPP**
2. **Whether Shri Ram Saran on 25.11.1990 had executed valid will in favour of the plaintiffs? OPP**
3. **Whether the plaintiffs are owners in possession of the suit property, as alleged? OPP**

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgment***? No.

4. **Whether the plaintiffs are entitled to the relief of permanent injunction? OPP**
5. **Whether Shri Ram Saran had been incapable of understanding his welfare and hence the will in question was void? OPD**
6. **Whether the defendants and Shri Ram Saran were governed by agricultural custom in the matter of succession? If so, what custom was? OPD**
7. **Whether the suit property was ancestral qua Ram Saran and the defendants as alleged? OPD**

The findings recorded by the trial court on the aforesaid issues are as under:

Issue No.1. No.
Issue No.2 No.
Issue No.3 No.
Issue No.4. No.
Issue No.5 Yes
Issue No.6 Not pressed.
Issue No.7 Not pressed.
Issue No.8 Yes.
Issue No.9 The suit dismissed with costs.

The trial court had dismissed the suit on 30th September, 1993. Feeling aggrieved by the judgment and decree passed by the trial court, the plaintiffs filed appeal before the Additional District Judge, Kullu. The Additional District Judge had framed the following points for determination:

Point No.1 **Whether it is proved on record that Smt. Sawarnu plaintiff-appellant was the legally wedded wife of Ram Saran alias Sanu deceased?**
Point No.2 **Whether it is further proved on record that Ram Saran alias Sanu executed impugned will Ex.PW-2/C in favour of the plaintiffs-appellants?**
Point No.3 **Final order.**

The Additional District Judge had recorded the following finings on the aforesaid points:

Point No.1	**No.**
Point No.2	**No.**
Point No.3	**The appeal is dismissed as per operative portion of judgment.**

The Additional District Judge had dismissed the appeal on 15.5.1995. Smt. Swarnu, appellant-plaintiff No.1 died on 12.9.1999 during the course of pendency of the second appeal and her legal representatives were ordered to be brought on record vide order 19.7.2000. The second appeal was admitted on the following substantial questions of law:

1. **Whether a deaf and dumb (thothla) person is legally disabled or incompetent to execute a will?**
2. **Whether a will can be said to have been duly executed or can only be proved only by examining both the attesting witnesses?**

Mr. C. B. Singh, Advocate had strenuously argued that the judgment and decree passed by the Additional District Judge is not sustainable in the eyes of law.

Mr. K.D. Sood, Advocate had supported the judgment and decree passed by the Additional District Judge.

I have heard the learned counsel for the parties and perused the record.

Since both the questions of law are inter-connected, therefore, the same can be conveniently discussed together.

Admittedly Smt. Swarnu, predecessor-in-interest of appellants No.1 (a) to (e) was married to Giru. After the death of Giru, she was married to one Shri Fateh Chand. Smt. Swarnu got divorce from Fateh

Chand on November 25, 1989 vide Ex.PW-2/A and on the same day, she was married to Ram Saran alias Sanu as per agreement Ex.PW-2/B. The parties were governed by the Hindu Marriage Act, 1955. It was not pleaded that the divorce could be obtained by Smt. Swarnu on the basis of any custom. Accordingly the marriage of Smt. Swarnu with Fateh Chand was never dissolved in accordance with law. Since the marriage was not dissolved in accordance with law, she could not marry Ram Saran alias Sanu. Smt. Swarnu could not be treated as a wife of Sh. Ram Saran alias Sanu. Sh. Ram Saran was deaf and dumb. He had filed a suit through his next friend in the court of Senior Sub Judge, Lauhal Spiti at Kullu against the sale of his property. The suit was decreed by the Senior Sub Judge Ex.D-1. The Senior Sub Judge had returned findings that Ram Saran was not capable of executing any sale deed or any other document. PW-9, Sh. Ishwar had also admitted that Ram Saran could neither speak nor hear. Shri Daulat Ram had filed an application in the Court of District Judge, Mandi, Kullu and Lauhal Spiti Camp at Kullu for appointment of guardian and manager to manage the properties of Ram Saran. The application was rejected by the District Judge on February 21, 1984. The District Judge had observed that he had put certain questions to Ram Saran but he could not answer the same with clarity.

Interestingly Smt. Swarnu took divorce from Fateh Chand on 25.11.1989 vide Ex.PW-2/A. She married Ram Saran on the basis of agreement Ex.PW-2/B and the will Ex.PW-2/C was also executed on 25.11.1989. The respondents were the nearest collateral of Ram Saran alias Sanu. It is evident from the combined reading of Ex.D-1 and P-1 dated 21st February, 1984 that Ram Saran was not in a position to execute the will Ex.PW2/C. The plaintiffs had made an endeavour to take advantage of the weak mental faculties of Ram Saran. The will in

question was never executed by Ram Saran in favour of Smt. Swarnu. The courts below have given a concurrent findings that the will Ex.PW-2/C was a fabricated document not binding upon the collateral of Ram Saran alias Sanu.

In view of the above discussion there is no substantial question of law involved in the second appeal.

As a result, the second appeal is dismissed with no order as to costs.

(Rajiv Sharma), Judge

July 26, 2007
Awasthi